SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 54

MARTIN J. BERNARDS AND LENA BERNARDS, HIS WIFE,

Petitioners,

vs.

M. R. JOHNSON, CATHERINE COLLINS, THE UNITED STATES NATIONAL BANK OF PORTLAND (OREGON), AND JOSEPH M. LOOMIS, TRUSTEE.

PETITIONERS' SUPPLEMENTAL BRIEF.

Summary of Procedure.

On August 10th, 1934 petitioners filed their petition for composition and extension of time under Section 75 (s) of the Bankruptcy Act (R. 1). On December 17th, 1934 the Conciliation Commissioner reported that the petitioners were unable to get a composition or extension of time from the majority creditor, M. R. Johnson (R. 8). On December 19th, 1934 the petitioners amended their petition asking to be adjudged bankrupts under old Section 75 (s) and on the same date they were adjudged bankrupts under old Section 75 (s) (R. 9 and R. 13 and 14). On December 20th, 1934 all the proceedings had heretofore were referred by the United

States District Court to Willard L. Marks, Referee in Bankruptcy, in accordance with the provisions of old Section 75 (s) (R. 14).

Petitioners Asked Benefits Under Old Section 75 (s).

On February 8th, 1935 the petitioners demanded the benefits under old Section 75 (s) in the following language:

> "That your petitioners desire that all of the property owned by them and described in their schedules attached to the amended petition, whether pledged, encumbered or unencumbered by liens, or otherwise, be appraised, and that appraisers be appointed to make such appraisal; and that your petitioners be allowed to retain possession of all of said real and personal property and pay for the same under the terms and conditions set forth in subsection (s) of Section 75 of the Bankruptcy Act:
>
> Wherefore, Your Petitioners pray that appraisers be appointed herein for the appraisal of all of the property of the bankrupts, whether pledged, encumbered or unencumbered by liens, or otherwise, and that the petitioners be allowed to retain possession of all of their property and pay for the same under the terms and conditions set forth in subsection (s) of Section 75 of the National Bankruptcy Act; and that petitioners be granted such other and further relief as may be necessary, appropriate and equitable herein (R. 36 and 37).

On May 27th, 1935 this Court held old Section 75 (s) unconstitutional in the *Radford* case, 295 U. S. 555. On August 28th, 1935 the President signed and approved the new Section 75 (s).

Status of Proceedings.

What was the status of the petitioners' proceedings when the old 75 (s) was held unconstitutional? They had asked to be adjudged bankrupts and were adjudged bankrupts

under old 75 (s). They had not asked to be adjudged bankrupts under the general law and being farmers could not be adjudged involuntary bankrupts under the general Bankruptcy Act.

It is our contention that when old 75 (s) was held unconstitutional all proceedings under it were suspended and the farmer-debtors found themselves again under Section 75 (a-r). They filed under Section 75 (a-r) to begin with and their case was never dismissed. It is true they attempted to get under old 75 (s) but their endeavor failed when that was held unconstitutional.

New 75 (s).

As we have seen the new 75 (s) was passed and became a law on August 28th, 1935 while petitioners' proceedings were still pending under Section 75 (a-r), or if we are mistaken in that they were at least pending somewhere under the Bankruptcy Act. One thing is sure—they were not dismissed. The new 75 (s) contains the following paragraph:

> "(5) This Act shall be held to apply to all existing cases now pending in any Federal court; under this Act, as well as to future cases; and all cases that have been dismissed by any conciliation commissioner, referee, or court because of the Supreme Court decision holding the former subsection (s) unconstitutional, shall be promptly reinstated, without any additional filing fee or charges.
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> Any farm debtor who has filed under the General Bankruptcy Act may take advantage of this section upon written request to the court; and a previous discharge of the debtor under any other section of this Act shall not be grounds for denying him the benefits of this section."

Since at the time of the enactment of the new 75 (s) this case was still pending in the District Court, the new 75 (s) revived the proceedings had under old 75 (s). The lan-

guage of the statute itself is clear and unmistakable. Congress intended to and did protect the cases that had been started and that had temporarily fallen by the wayside with old 75 (s). There could be no other reason for putting the words "This Act shall apply to all existing cases now pending in any Federal Court, under this Act, as well as future cases," into new 75 (s). Congress expressly revived the proceedings under old 75 (s) by unmistakable language in new 75 (s).

Intervening Rights.

When Congress reenacted subsection (s) and provided that "This Act shall be held to apply to all existing cases now pending in any Federal court, under this Act, as well as to future cases, and all cases that have been dismissed by any conciliation commissioner, referee, or court because of the Supreme Court decision holding the former subsection (s) unconstitutional, shall be promptly reinstated, without any additional filing fees or charges."

By that language Congress had reference to and intent to revive the proceedings in cases pending and to reinstate the proceedings in cases that were dismissed. It did not intend to interfere with constitutional intervening rights. Of course, if in any such case while it was dismissed the farmer-debtor lost all interest and title then the Court also lost jurisdiction, in that particular case, when it was reinstated.

In this case there are no intervening rights.

Petitioners Act Promptly.

On September 30th, 1935, petitioners, after reciting proceedings had under Section 75 (s), including old 75 (s), asked the Bankruptcy Court that all of the proceedings had and all of the documents and records in possession of the Referee be transferred to the Conciliation Commissioner in

accordance with new 75 (s), approved August 28th, 1935 (R. 16).

It is undisputed that among these documents and records was the amended petition of December 19th, 1934, and the order adjudging petitioners bankrupt under old 75 (s) (R. 9 and R. 13 and 14). It is equally undisputed that among these documents and records was the petition of February 8th, 1935, in which the petitioners asked for the benefits of old 75 (s) and asked specifically that an appraisal be authorized and that they be given possession of their property in accordance with provisions of Section 75 (s) (R. 36).

On the same date, September 30th, 1935, the United States District Court, after reciting the fact that the petitioners had been adjudged bankrupts and that the powers of the Conciliation Commission had been enlarged under new 75 (s) made the following order:

> "Be it Therefore Ordered that the order of reference heretofore made to Willard L. Marks, Referee in Bankruptcy, be and the same is hereby recalled, and that said Referee in Bankruptcy be and he is hereby authorized and directed to transmit to this Court all records, documents, and proceedings in the matter of the estates of the above-named bankrupts now in his possession, and prepare and file with this Court a report of all proceedings had before him up to the time of transfer; and
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> Be it Further Ordered that said proceedings be referred to H. A. Kuratli, Conciliation Commissioner of the County of Washington in the State and District of Oregon" (R. 18).

Respondents did not appeal from the above order granting petitioners' petition of September 30th, 1935, nor would an appeal have been successful. This petition asked the revival of the proceedings had under old 75 (s). When old 75 (s) was held unconstitutional the proceedings became dormant until they were revived by the Congressional Act.

Since this case was never dismissed but remained pending at all times in a court of bankruptcy, there could have been and were no intervening rights.

All of petitioners' property was under the sole and absolute jurisdiction of the Court in Bankruptcy. The proceedings in the State court were void; they were without authority and without jurisdiction. But even if the unwarranted sales could by any imagination be given vitality, then nevertheless, when the new 75 (s) was passed and the petition of September 30th, 1935, was granted, the period of redemption had not run in either of the foreclosure sales.

In the case of M. R. Johnson the so-called period of redemption under the void sale did not expire until June 29th, 1936, and the period of redemption in the Collins' void foreclosure sale did not expire until August 26th, 1936. We say void sale because the State court had no jurisdiction. The proceedings were pending in the Bankruptcy Court. Under the Oregon law the period of redemption is one year from the date of sale. *Kalb* v. *Feuerstein*, 60 Sup. Ct. 343.

Even before the above cases and before Section 75 of the Bankruptcy Act was passed the courts universally held that there was no divided jurisdiction over the bankrupt property between the Federal Courts of Bankruptcy and the State Courts.

> "Upon adjudication of bankruptcy, *title* to all the *property* of the bankrupt, wherever situated, *vests* in the trustee as of the date of filing the petition in bankruptcy. The bankruptcy court has *exclusive* jurisdiction, and that court's possession and control of the estate *can not be affected* by proceedings in other courts, State or Federal. Isaacs v. Hobbs Tie & T. Co., 282 U. S. 734, 737 and cases cited. Such jurisdiction having attached control of the *administration of the estate can not be surrendered even by the court itself.* Id., 739. *The filing of the petition is a caveat to all the world and in fact an attachment and an injunction.*

May *v.* Henderson, 268 U. S. 111, 117. Gross *v.* Irving Trust Co., 289 U. S. 342."

All of the subsections from a to s inclusive of 75 must be construed together as one act. The argument that the stay of Section 75 (o) applies only to proceedings of (a) and (r) is absurd. The stay is statutory and not judicial. The jurisdiction is in the Federal Court and can not be usurped by State courts.

Cannot Surrender Jurisdiction.

"For the Court to afford the relief which the section as amended contemplates, it is necessary that the *exclusive and paramount jurisdiction* of the court *over* the *property* of the bankrupt be *maintained;* and there can be no question but that the provisions of subsections (n) and (o) apply as well to proceedings continued under subsection (s) as to proceedings under the other provisions of section 75. * * * And we do not think that the right to stay proceedings in the State court is precluded because a sale has taken place in foreclosure proceedings if there has been no confirmation of the sale" Bradford *v.* Fahey, 76 F. (2d) 628 (C. C. A. 4th.)"

In the case of *In re O'Brien*, C. C. A. 2, 78 D 92d) 715, the court held the lien to be void saying:

"On the face of the statute *it is entirely clear* that Congress *intended* the bankruptcy court to have *exclusive* jurisdiction over the farmer's property *from the moment he should file a petition* for relief under section 75. This is *inferentially* shown by the final sentence of subsection (e), Section 75, and is *expressly stated* in subsection (n), Section 75. * * *

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"And subsection (o), Section 75, *specifically* declares that neither proceedings affecting title nor proceedings for the recovery of any debt *shall be instituted*, or, if already instituted, *maintained* against the farmer or his property at any time *after the filing of the petition*

> and *prior to the confirmation* or other disposition by the court of the composition or extension proposal. *These provisions put it beyond debate that after the filing of the farmer's petition no creditor was to be permitted to better his position by litigation in another court.* See Bradford *v.* Fahey (C. C. A. 4th Cir.) 76 F. (2d) 628, 637; In re Dickinson (D. C. Wyo.) 9 F. Supp. 227, 229; Eaves . Glenn (D. C. Tex.) 9 F. Supp. 647, 648. Hence the bank's judgment improperly taken after O'Brien had filed his petition in the Court below *cannot* impose *any valid lien* on the debtor's property."

In the cases of *Borchard et al.* v. *Bank of California et al.*, 60 Sup. Ct. 957; *John Hancock Mutual Life Ins. Co.* v. *Bartels*, 308 U. S. 180, 60 Sup. Ct. 221; *Kalb* v. *Fuererstein*, 60 Sup. Ct. 348; *Union Joint Stock Land Bank* v. *Byerly* 60 Ct. 773, this Court has in effect reversed every position upon which the court below based its erroneous decision. It has reversed the idea that the farmer must convince the court that he is able to rehabilitate himself within three years. It has reversed the idea that the stay in Section 75 is judicial and not mandatory. In these cases this Court has clearly interpreted the spirit and intent of Congress. It has clearly interpreted the statute by holding that any proceeding in a State court while a case is pending in a Federal court is void.

History.

Section 75 of the Bankruptcy Act was originally passed in the closing days of the Hoover Administration, in March, 1933. The present Frazier-Lemke Amendments were added and became a law on August 28th, 1935. Contrary to the general belief, the Frazier-Lemke Amendments did not only add subsection (s) but also amended existing subsections (b) (j) (k) (n) and (p) of Section 75, as well as amending old subsection (s).

Therefore it is clear that Congress considered Section 75 as one and a complete Act. It did not consider every

subsection an independent Act. Every subsection of Section 75 of the Bankruptcy Act must be construed in conjunction and harmony with every other subsection including subsections (o) and (s). The whole section must be given full force and effect. That was the intent of Congress.

Recall of Mandate.

In the case at bar the Circuit Court of Appeals issued an order staying the mandate pending the decision of this Court on the petitioners' petition for writ of certiorari (R. 158). This Court denied that petition on October 23rd, 1939, but that had taken the Circuit Court into another term of court. Then on November 4th, 1939, the petitioners filed a motion in the Circuit Court of Appeals to recall and withhold the mandate pending the decision of this Court in the *Bartels* case (R. 159). That petition the Circuit Court denied November 6th, 1939 (R. 160).

On December 4th, 1939, this Court decided the *Bartels* case. In that case this Court decided all of the material issues in petitioners' case in their favor. Thereupon on January 2nd, 1940, petitioners filed a motion for recall and correction of the mandate (R. 160).

Thereupon respondents on January 12th, 1940, filed a motion to dismiss petitioners' motion for recall and correction of the mandate (R. 161). On March 22nd, 1940, the Circuit Court of Appeals denied petitioners' motion, but it did not dismiss it as requested by respondents (R. 162). From this it is clear that the court retained jurisdiction of the mandate.

The motion to recall or vacate the mandate was made during the same term that the mandate was issued. Consequently this Court has jurisdiction to correct the erroneous decision of the Circuit Court when it denied petitioners' motion of January 2nd, 1940, and refused to correct its erroneous decision theretofore made.

Cases Cited by Respondents.

We have again looked over the decisions cited by respondents in support of their position but find that the cases they cite are not in point. In all of the cases they cited the judgments had become final, and both the decision and mandate had been issued in a prior term.

We have again read the *Schell* v. *Dodge* case and are not certain just when the mandate did issue in that case, whether it was at the prior term of court or not, but we are certain that that case has no application to the present case. In that case there was no petition for certiorari pending, the judgment had become final. There this Court was asked to change its own decision at a later term of the Court.

We wish to call the Court's attention, however, to the case of the *Missouri Pacific R. R.* v. *Norwood*, 283 U. S. 249, in which this Court affirmed the Circuit Court of Appeals on April 13th, 1931. Then on June 1st, 1931, this Court did not hesitate to modify its judgment. 283 U. S. 809.

Conclusion.

In conclusion permit us to suggest that while respondents complain of delay on the part of petitioners yet the record is complete and shows that the petitioners endeavored from the very outset to get an appraisal of the property and retain possession. This request was repeatedly made by petition, as is shown by the transcript of the record. "February 8th, 1935, R. 36, October 1st, 1936, R. 19, August 8th, 1936, R. 22, January 4th, 1937, R. 25, January 13th, 1937, R. 31, January 15, 1937, R. 77, January 29th, 1937, R. 33 and August 13th, 1938, R. 34."

The record shows that in every instance the respondents opposed and succeeded in blocking the petitioners from getting and enjoying the benefits of Section 75 in accordance with the intent of Congress. They refused a composition

and extension of time and opposed the appraisal and the giving of possession to petitioners (R. 8 and 9). They succeeded in getting a trustee appointed instead (R. 54-57). They proceeded in violation of Section 75 and without jurisdiction with foreclosure in the State court in order to deprive the petitioners of their property and having obtained a void deed from the State court attempted to get it validated by having the Federal court quiet title in them (court's findings of fact, R. 64-74).

The proceeding here is under Section 75 of the Bankruptcy Act. The United States District Court sat as a court of equity and the general principles that, "He who seeks equity must do equity," or "He who comes into equity must come with clean hands," applies. The attempt to get something for nothing at the expense of another, because of legal technicalities, never has and never will succeed in a court of equity.

"Equity regards substance and not form." "It regards that done which ought to have been done." In short a court of equity uses common horse sense and does justice between the parties on the broad principles of right and wrong. We concede that it does this within well-established rules of practice and procedure.

We respectfully submit that the Circuit Court of Appeals erred in confirming the decision of the District Court in the two orders entered on May 10th, 1938 (R. 51-57), in which the District Court considered the petitioners' petition and denied petitioners the benefit of Section 75, and erroneously attempted to quiet title in the respondents (R. 64-74 and R. 37-39).

Respectfully submitted,

WM. LEMKE.